

## Insurance & Reinsurance - Canada

### Waiving goodbye to your rights: implications for insurers and insureds

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Signing a waiver relieving another person from liability is not unusual in the commercial context. However, these waivers are useless if they are not properly drafted and presented, which can create complications for both insurers and insureds. The problems associated with using an improper waiver were demonstrated in a recent case where a deficient waiver resulted in serious consequences for the instructors and organisers of a motorcycle training course, which created liability for the insured.

Deanna Gallant wanted to learn how to ride a motorcycle. Fanshawe College, located near London, Ontario, ran a weekend 'Motorcycle Training' programme supported by private and government agencies, including the Canada Safety Council. During the training programme, Gallant was seriously injured after failing to navigate a turn properly and then striking a concrete barrier.

As part of the programme, students were given a number of documents when they arrived for the first day of the course. These documents included a manual and a document purporting to release Fanshawe, the Canada Safety Council, the sponsors and all instructors from liability. Notably, the students were presented with these documents well after they had registered and paid for the course and after they had booked their weekend arrangements in London.

While she had no recollection of signing this latter document, Gallant agreed that she had signed it and that her signature was witnessed by two others. The waiver document provided as follows:

*"I, Deanna Gallant, hereby agree to release the Canada Safety Council, private and government agencies who support the Motorcycle Training program, Fanshawe College, and all instructional staff from all responsibility, property damage, bodily injury, costs and expenses, or claims of every nature and kind arising from, or in consequence of my participation in the motorcycle training course; and to render and save harmless the Canada Safety Council, all private and government agencies who support the motorcycle training program, Fanshawe College, and all instructional staff from all claims and rights of action which might arise through my participation."*

When Fanshawe attempted to rely on this waiver at trial, the court found that the waiver was ambiguous because of its failure to include certain terms and provisions which were legally meaningful and were in fact found in the Canada Safety Council's model waiver. Without these terms, the waiver was not sufficiently understandable and consequently could not be relied on by the defendant.

Evidence submitted at trial indicated that the students were given the clear impression that they would be taught with safe equipment in a safe environment by qualified instructors. The court found that a party cannot make such promises on the one hand and then on the other seek to have those promises released, unless the release is in clear and unambiguous language and wording. As motorcycle riding is a risky activity, a party seeking a waiver for liability due to its negligence is required to use clear language. Only in very rare circumstances will a person genuinely and clearly consent to accepting the risk of negligence by another party.

The waiver's integrity was also threatened by the context: before arriving in London, Gallant was not advised that she would have to sign a waiver, nor was the implication of the document explained to her when she registered and paid for the course. The waiver was first presented to Gallant in a classroom of 30 people when many other papers were being circulated, and it was stated that the waiver was a condition of the course for which payment had already been made. The instructor did not question the students as to their understanding of the implications of the waiver. Specifically, the court held that the instructor should have made it clear to the students that the students were waiving all rights to make a claim against the instructor, Fanshawe and the sponsors. While it

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is reasonable to assume that the students - including Gallant - were assuming their own risks in a safe environment, there was no evidence that the students thought that they were also assuming the risks of instructor negligence, particularly since the waiver did not explicitly make this claim.

While the *Gallant* case is specifically about personal injuries, waivers are often used in commercial contexts in order to protect companies from being sued. The use of improper waivers can also jeopardise insurance coverage.

Insurers are advised to make clear to insureds the situations and acts which can void insurance coverage and to work with insureds to ensure that waivers are properly prepared and delivered.

Parties looking to be covered by an enforceable waiver are advised to:

- consider the risks inherent in an activity and/or product and the types and classes of risk for which it will retain liability;
- use precise waivers, describing and listing the risks and dangers of the activity or product;
- where the risk of negligence is intended to be waived, state this clearly and consider describing the type of negligent conduct that is intended to be covered;
- where a waiver will be required, advise the other party as early as possible, explain the implication of the waiver and offer the other party the opportunity to reject the deal as a whole if the waiver is unsatisfactory;
- work with their insurer and insurance broker to ensure that the contents of the waiver and the mechanism and timing of its presentation will not put insurance coverage at risk; and
- consult with counsel to ensure that their rights are sufficiently protected and that the waiver accomplishes their sought goals.

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